

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

74-1147

B
Pg 5

In The
United States Court of Appeals

For the Second Circuit

THE UNITED STATES OF AMERICA,

Appellant,

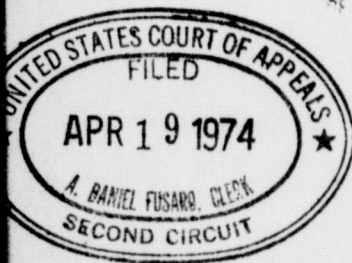
v.

**ANTHONY JAMES SEBASTIAN a/k/a TONY
SEBASTIAN and PATRICK GIBBONS,**

Appellees.

**On Appeal from the United States District Court
for the Western District of New York,
Cr. 1973-237.**

BRIEF FOR THE APPELLEES



Attorneys for Appellees:

**DOYLE & DENMAN,
GEORGE P. DOYLE, *Of Counsel*
10 Ellicott Square Building
Buffalo, New York 14203**

**MARTOCHE & COLLESANO,
STANLEY J. COLLESANO, *Of Counsel*
76 Niagara Street
Buffalo, New York 14202**

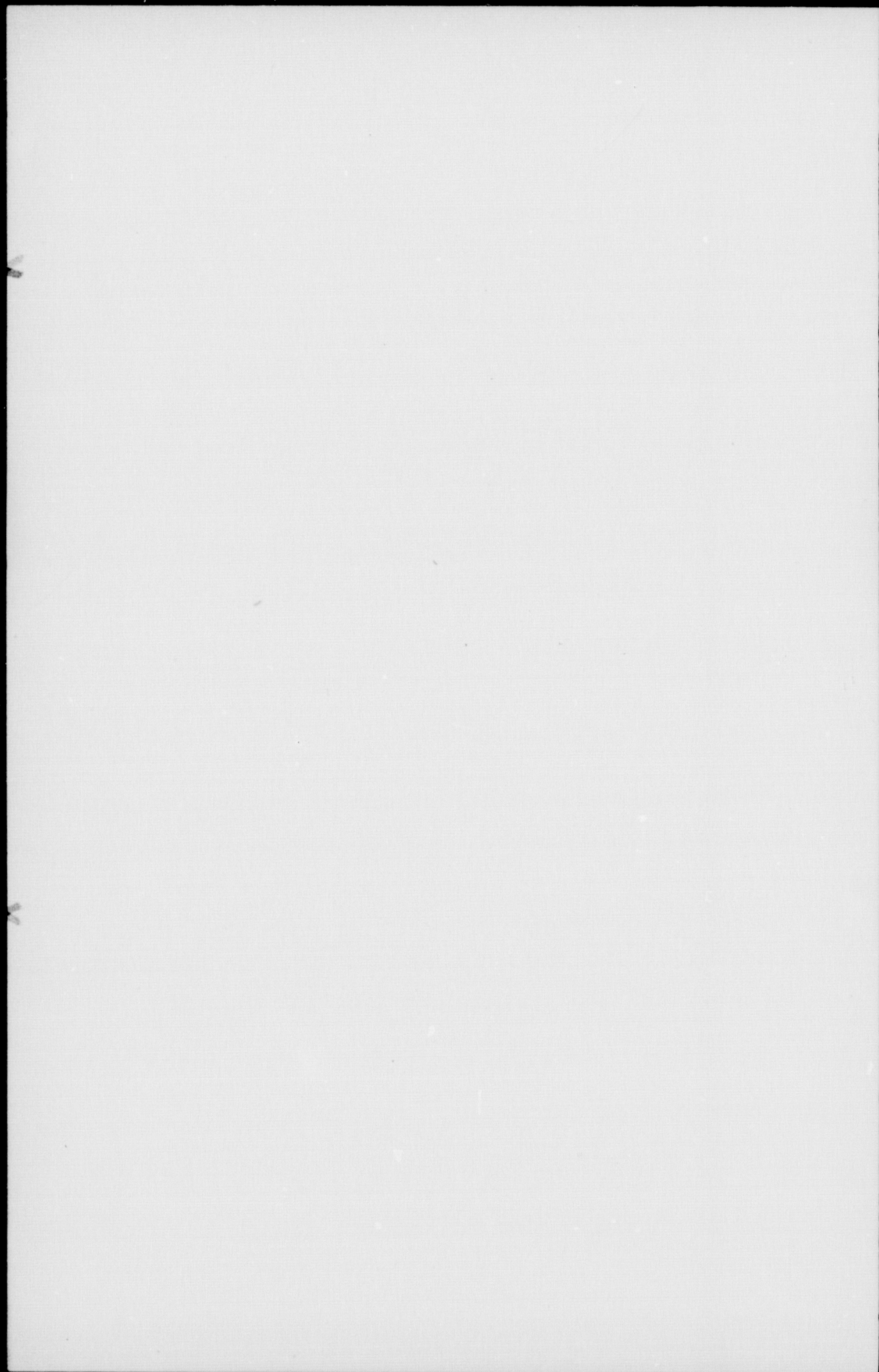


TABLE OF CONTENTS

	Page
Preliminary Statement	1
Questions Presented	2
Statement of Facts	2
POINT I — The Jencks Act, 18 U.S.C. §3500, does not prohibit the production of statements of Government witnesses after they have testified on direct examination at a suppression hearing.	6
POINT II — The material ordered produced by the District Court is within the purview of the Jencks Act, 18 U.S.C. §3500, and is thus subject to production under the provisions of that act.	17
CONCLUSION	18

Table of Cases

<i>Jencks v. United States</i> , 353 U.S. 657 (1957)	6
<i>Robbins v. United States</i> , 476 F.2d 26 (10th Cir. 1973) .	11
<i>Rouse v. United States</i> , 359 F.2d 1014, 1017 n.1 (D.C.Cir. 1966)	15
<i>United States v. Abrams</i> , 29 FRD 178 (SDNY, 1961) ..	11
<i>United States v. Cobb</i> , 271 F. Supp. 159 (SDNY, 1967)	11
<i>United States v. Covello</i> , 410 F.2d 536 (1969)	2, 4, 9, 13
<i>United States v. Foley</i> , 283 F.2d 582 (1960)	2, 4, 12
<i>United States v. Leighton</i> , 265 F. Supp. 27 (SDNY, 1967)	11
<i>United States v. Lyles</i> , 471 F.2d 1167 (5th Cir. 1973) ..	10
<i>United States v. McMillen</i> , 489 F.2d 229 (7th Cir. 1972)	10

	Page
<i>United States v. Montos</i> , 421 F.2d 215 (5th Cir. 1970) . . .	15
<i>United States v. O'Connor</i> , 273 F.2d 358 (2d Cir. 1959) . . .	17
<i>United States v. Percevault</i> , 490 F.2d 126 (2d Cir. 1974) . . .	13
<i>United States v. Tane</i> , 29 FRD 131 (SDNY, 1962)	11
<i>United States v. Wallace</i> , 272 F. Supp. 838 (SDNY, 1967)	11
<i>United States v. White</i> , Crim. No. 22028, N.D.Ga. July 18, 1957	7

Statutes and Authorities

18 U.S.C. § 371	1, 2
18 U.S.C. § 472	1, 2
18 U.S.C. § 3500	2, 5, 6, 17
18 U.S.C. § 3731	2, 6
F. R. Crim. P. Rule 16 (a)	14
Senate Report No. 981	8, 9
67 Yale Law Journal 674, 683-4	7
67 Yale Law Journal 680-682	7

In The
United States Court of Appeals

For the Second Circuit

THE UNITED STATES OF AMERICA,
Appellant,

v.

**ANTHONY JAMES SEBASTIAN a/k/a TONY
SEBASTIAN and PATRICK GIBBONS,**
Appellees.

**On Appeal from the United States District Court
for the Western District of New York,
Cr. 1973-237.**

BRIEF FOR THE APPELLEES

Preliminary Statement

The United States of America appeals from an Order of the Honorable John T. Curtin, United States District Court Judge for the Western District of New York, entered on December 21, 1973, suppressing certain Government evidence in a prosecution of Defendants Anthony James Sebastian and Patrick Gibbons for uttering and passing forged United States savings bonds, and for conspiracy to do so, in violation of 18 U.S.C. §§472 and 371, respectively.

The evidence so suppressed consists of certain stock certificates, credit cards and payroll checks seized from Defendant Gibbons by a deputy sheriff of Marion County, Ohio; and a written statement taken from Defendant Sebastian by a United States Secret Service agent in Buffalo, New York.

At the Suppression Hearing, the District Court, after direct examination of the Government witnesses, ordered the United States to turn over to appellees certain prior statements of those witnesses relating to the subject matter of their testimony. The Court ruled that the production of such prior statements was necessary to a complete and fair hearing of the facts at issue in the Suppression Hearing. When the government declined to turn over these materials, the District Court granted Appellees' motion to suppress the items of physical evidence in question, relying on this Court's interpretations of 18 U.S.C. §3500 in *United States v. Foley*, 283 F.2d 582 (1960) and *United States v. Covello*, 410 F.2d 536 (1969).

On January 14, 1974, the Government filed a Notice of Appeal pursuant to 18 U.S.C. §3731. On January 30, 1974, the Government filed with this Court the Record on Appeal, and on March 12, 1974, filed a brief (dated March 7, 1974) with this Court.

Questions Presented

1. Did Judge Curtin abuse his discretion under the Jencks Act, 18 U.S.C. §3500, in requiring the Government, in the context of this case, to turn over to Defendants at a Suppression Hearing, the prior statements of the Government witnesses who had already testified on direct examination, where the Court's order was narrowly and precisely limited to the prior statements concerning those matters about which the Government witness had testified?

2. Are the materials Judge Curtin ordered produced within the purview of the Jencks Act, 18 U.S.C. §3500?

Statement of Facts

On June 21, 1973, appellees were indicted for passing and uttering forged United States Savings Bonds, and conspiracy to do so, in violation of 18 U.S.C. §§472 and 371, respectively.

The indictment alleged that the crimes charged occurred during May, 1972.

On December 19, 1973, the District Court held a Suppression Hearing on defense motions to suppress certain items of the Government's evidence. Two Government witnesses testified at this hearing.

The first witness, Gary C. Behm, a deputy sheriff of Marion County, Ohio, testified to the arrest of Defendant Gibbons in Ohio on December 8, 1972, on a state charge of passing a forged check, and to a search and resulting seizure of four challenged items of evidence: (1) Five stock certificates in the name of Robert Goulder (Government Exhibit #1), (2) Twenty-six credit cards in the name of Robert Goulder (Government Exhibit #2), (3) Sixteen Blaner Manufacturing Company checks payable to Robert Goulder (Government Exhibit #3), (4) Sixty blank Blaner Manufacturing Company checks (Government Exhibit #4). These items were allegedly stolen from the Robert Goulder residence in Ohio on May 14, 1972, along with the United States savings bonds which are the subject of the indictment in the present case. Deputy Sheriff Behm testified that, after being alerted by radio, he arrived at the scene of the arrest after a 1967 Chevrolet, in which Defendant Gibbons had been riding, had been stopped by Sheriff Smith of the adjacent county (Tr. pp. 6-9).¹ Deputy Sheriff Behm testified that after arresting Gibbons and a companion, he searched the car and that while he was searching the car he observed Sheriff Smith get a plastic "Hoover sweeping bag" from beneath a blue car parked in the same parking lot as that in which Defendant's car had been stopped (Tr. pp. 13-17). Deputy Sheriff Behm testified that in this bag were found the four items of evidence (Tr. pp. 16-18). Subsequent to the direct examination of Deputy Sheriff Behm and on motion of defense counsel, the District

¹References in this form are to the transcript of Proceedings of Hearing on Motion to Suppress held before the Hon. John T. Curtin . . . on December 19, 1973.

Court ordered the Government to turn over "that part of Mr. Behm's investigative file which is thirty-five hundred material" (Tr. p. 26; see also p. 30). The Court carefully observed:

In that file there may be some statements made by other people, his superiors, maybe the store witnesses and things which are separate from his particular statement, so if that is the case I am not directing that you make those available, but whatever summary he made of his investigation, that shall be marked and made available . . . look at it and if in your judgment there is anything that should not be made available to defense you may set it aside, although please inform me of that action so that you and I can take it up. (Tr. pp. 25-26)

After a recess was taken to allow the Assistant United States Attorney to confer with her superiors, the Government declined to make this material available to defense counsel. When the Assistant United States Attorney referred to a supposed "prospective decision that in all future cases Jencks material would have to be turned over" (Tr. p. 31), Judge Curtin responded:

I think I ought to make clear that this is not an automatic situation that there may be cases where it appears to me that there is good argument, that perhaps there is a good argument that the Government may be able to make why material should not be turned over at this time, but these things perhaps should be taken up on a case by case basis. (Tr. p. 31)

The Court indicated that as a general rule, the Government should have this material available in court for possible production on order (Tr. pp. 31-32). When the Government declined to turn that material over to the defense, the Court, ruling that the materials were necessary for a fair and fruitful cross-examination, ordered the evidence (Government Exhibits 1-4) suppressed. The Court based its ruling on this Court's decisions in *United States v. Foley*, 283 F.2d 582 (1960) and *United States v. Covello*, 410 F.2d 536 (1969), which it read as

holding that District Court had discretion under 18 U.S.C. §3500 to order such production (Tr. pp. 32-34; cf. Appendix for Appellant, pp. 11-12).

The second Government witness, Samuel J. Zona, a United States Secret Service Special Agent in Buffalo, New York, testified to the arrest of Defendant Sebastian on May 24, 1973, and to Sebastian's alleged execution of a "waiver of rights" form and a signed statement (Government Exhibits #5 and 6) (Tr. pp. 41-45). After direct examination of Mr. Zona, the District Court, on defense motion, ordered the Government to turn over to the defense a memorandum by Mr. Zona concerning his arrest and interrogation of Defendant Sebastian. When the Government declined to make that report available, Judge Curtin ordered the evidence (Government Exhibits #5 and 6) suppressed. The Court again carefully delimited the scope of its order:

I don't direct you at this time, Mrs. Srebro, to turn over to defense counsel the statements of other witnesses. All I am asking is that you give to defense counsel here some summary, if you have a summary, of notes of Mr. Zona of his conversation with Mr. Sebastian the particular day in question. (Tr. p. 49)

The Court took considerable care to winnow this material from other material in the investigative file (Tr. pp. 51-54), and ordered produced only the prior reports of Agent Zona which related to the subject matter of his testimony at the Suppression Hearing. The Court again grounded its ruling on the necessity for a fair hearing on the factual issues involved in the hearing:

It appears to the Court that it is essential that these materials be made available to counsel for cross examination and without it a complete, factual, fair hearing can not be held. Therefore, I reluctantly, but I think I must grant the motion for suppression of the evidence. (Tr. p. 55; Cf. pp. 47-48)

Subsequent to this oral order of the Court at the hearing, December 19, 1973, the Court on December 21, 1973, entered a written order accordingly.

On January 14, 1974, the Government filed a Notice of Appeal pursuant to 18 U.S.C. §3731, and certified, as required by that section, that the appeal was not taken for the purpose of delay and that the evidence suppressed is substantial proof of facts material in the case. On January 30, 1974, the Government filed with this Court the Record on Appeal, and on March 12, 1974, filed a brief (dated March 7, 1974) with this Court.

POINT I

The Jencks Act, 18 U.S.C. §3500, does not prohibit the production of statements of Government witnesses after they have testified on direct examination at a suppression hearing

The question presented here is whether a District Court Judge, presiding over a hearing on defense motions to suppress certain evidence, may, consistent with the provisions of the Jencks Act, order the Government to turn over to defense counsel prior statements of Government witnesses after the witnesses have testified on direct examination at the hearing. While the Government poses its question in terms of a fishing expedition through the Government "investigative files," such a factual situation is not at issue here, nor could it be, in view of the carefully limited scope of Judge Curtin's order.

In its brief, the Government places great reliance upon the proceedings before the Senate and the House of Representatives subsequent to the decision in *Jencks vs. United States*, 353 U.S. 657 (1957). Concededly, in the intervening period between the decision in *Jencks* and the passage of 18 U.S.C. §3500, certain lower courts directed the production of materials far outside the intended scope of the *Jencks* decision.

The basis for the misinterpretation of *Jencks* and the public hysteria which accompanied the decision may be found in two sources. The first lies in the dissenting opinion of Mr. Justice Clark. Despite the majority's particular admonition that the decision "... did not propose any broad or blind fishing expedition ..." (353 U.S. at 667), Mr. Justice Clark, the lone dissenter, set the tone for the public outcry to Congress which was to follow:

"Unless the Congress changes the rule announced by the Court today, those intelligence agencies of our Government engaged in law enforcement may as well close up shop, for the Court has opened their files to the criminal and thus afforded him a Roman holiday for rummaging through confidential information as well as vital national secrets". (353 U.S. at 681-2)

The second, and most distressing reason underlying the misinterpretation of the intent of the Jencks Act may be attributed to the erroneous statements made by prosecuting attorneys whereby the public was led to believe that the purported scope of production orders was far beyond the actual material involved.²

Armed with the public's dissatisfaction in the Court's decision,³ Congress proceeded with utmost haste to curb the

²In the course of ruling on the Defendant's motion in *United States vs. White*, Crim. No. 22028, N.D.Ga. July 18, 1957, the trial judge addressed the prosecuting attorney as follows: 'Now, when you hold your press conference, and when you talk to Washington, be very careful, please, sir, not to state to the press, nor to Washington, that this Court has ordered you and directed you to deliver to defense counsel your entire file, because the Court has not done so — in this case nor in any other case. I am advised by Judge Hooper and by Judge Johnson that neither of them did any such thing in their cases, yet reports went out from your office that I had done so, that Judge Johnson had done so, that Judge Hooper had done so. . . All of those reports were erroneous. Neither Judge has ever held any such thing.' Transcript of Record, *United States v. White*, supra, from "The Jencks Legislation: Problems in Prospect," 67 Yale Law Journal 674, 683-4, n. 34.

³A collection of statements and editorials relating to the public response to Jencks is set forth in 67 Yale Law Journal at 680-682.

effects of the misinterpretation of *Jencks*. In order that the actions of Congress not be challenged as restricting constitutional rights, the Committee on the Judiciary issued a disclaimer in the Report accompanying S. 2377:

"The proposed legislation is not designed to nullify, or to curb, or to limit the decision of the Supreme Court insofar as due process is concerned. The committee believes that legislation would clearly be unconstitutional if it sought to restrict due process". (S.Rep.No. 981, 85th Cong., 1st Sess., August 15, 1957 at 1957 U.S. Code Cong. & Adm. News 1862).

While the Government here relies heavily on citations to the Senate Report which refer to "trial", the clear import of the Report is that the statute is designed to protect the procedural rights of the Defendant while preventing unwarranted incursions into the investigative files of Government agencies. The distinction which must be drawn — one which the Government has apparently lost sight of — is that neither the *Jencks* decision, nor the act which followed it, was designed to supplant the discovery procedures set forth in the Federal Rules of Criminal Procedure. Both were designed to protect the Defendant's right to a full and effective cross-examination via the production of statements relevant for *impeachment* purposes. The Senate Report, itself, sets forth the standards necessary for disclosure:

"... it is the specific intent of the bill to provide for the production of statements, reports, transcriptions or recordings, as described in the bill, after the Government witness has testified against the Defendant on *direct examination in open Court*, and to prevent disclosure before such witness has testified". (S.Rep.No. 981, *supra*, at 1863). (Emphasis added).

The Report continued in its original tenor, but again without alluding to a suppression hearing:

"It appears to the committee that, briefly stated, the theory of the majority of the Court is that if the Government sends into court a witness to testify against

a Defendant, and the Government has, at the same time in its files, an authenticated statement or report by the witness having to do with the activities of the Defendant, the Defendant is justified in asking for and receiving an order compelling the presentation in court of the material if it relates to the testimony of the witness. (*Id.*, at 1864).

This court, in *United States v. Covello*, 410 F.2d 536 (2d Cir, 1969), took notice of the fact that nowhere in the legislative history or the statute itself did Congress address itself to the question of the applicability of the law to suppression hearings. The Court reached the inescapable conclusion that "in all probability Congress did not consider the question whether a suppression hearing is itself a 'trial' or whether such a hearing is so much an integral part of the criminal trial that determines a Defendant's innocence or guilt so as to intend either the Act apply to such a hearing or that it not do so". (410 F.2d at 544).

Appellees submit that, in view of the clear dual intent of the Jencks Act, to prevent unwarranted rummaging through Government files, while at the same time to preserve Defendants' due process rights to fair adjudication, this question must be answered so as to permit a full and fair trial of the issues raised at the suppression hearing. To read the statute as denying such right would be to impute to Congress the intent, specifically disclaimed in Senate Report No. 981, *supra*, to abridge Defendant's due process rights to a fair hearing. At the very least, the statute must be read to allow the District Court, presiding over the hearing on the motion to suppress, to turn over the minimal amount of material ordered produced in this case.

In its brief, the Government places great reliance upon several decisions originating in other circuits which purportedly lend authority to the proposition that the defense must be denied access to 3500 material at a suppression hearing. Its reliance on these cases is misplaced, for two reasons. First, the majority of

the cases cited by the Government involve instances where the Defendant had sought, either by motions for pre-trial discovery under Rule 16 of the Federal Rules of Criminal Procedure or by preliminary hearing, access to statements of prospective witnesses for general preparation for trial. The Defendants here claim excess by virtue of their right to a constitutionally mandated suppression hearing, at which they seek a full hearing, in open court, on the issues of the lawfulness of a seizure and the voluntariness of a confession, and do not seek general discovery of the prosecution's case.

The second distinction which must be drawn between the cases cited and that presently before the court becomes clear when the procedural posture of those cases is remembered. The remainder of the Government's cases have all been appeals from convictions where the district judge declined, in the exercise of his discretion, to order the production of statements in the hands of the Government. The decisions necessarily hold no more than that the Courts of Appeals will not reverse a legitimate exercise of a trial court's discretion not to require the production of statements unless a clear abuse of that discretion is shown to exist.

In *United States v. McMillen*, 489 F.2d 229 (7th Cir. 1972), the Defendant made a pre-trial motion for *discovery* of statements of all Co-defendants, including a prospective Government witness. When the district court ordered production, the Government sought a writ of mandamus vacating that order. Relying upon the fact that the statements were attributed to a *prospective* witness, the Seventh Circuit granted the writ.

To the same effect is *United States v. Lyles*, 471 F.2d 1167 (5th Cir. 1973) where the defendant asked for "all witnesses' statements taken in the investigation of his case". Again, these were potential witnesses who had not yet testified in open court. "The Jencks Act, . . . requires only that the government disclose

the statements of witnesses who actually testify, *after* they have testified. Lyles was therefore not entitled to statements of *prospective* government witnesses". (471 F.2d at 1169). (Emphasis added.)

The district courts in this circuit have similarly followed the intent of the Jencks Act by denying the defense access to statements of prospective Government witnesses under pre-trial motions for discovery. *United States v. Wallace*, 272 F. Supp. 838 (SDNY, 1967); *United States v. Cobb*, 271 F. Supp. 159 (SDNY, 1967); *United States v. Leighton*, 265 F. Supp. 27 (SDNY, 1967); *United States v. Tane*, 29 FRD 131 (SDNY, 1962); *United States v. Abrams*, 29 FRD 178 (SDNY, 1961).

The Government further relies on *Robbins v. United States*, 476 F.2d 26 (10th Cir. 1973), affirming a magistrate's refusal to order the production of 3500 material. The Tenth Circuit rested its decision upon two grounds. First the Jencks Act itself refers to "the court"; a magistrate does not fall within the traditional confines of that term. In continuing the analysis, the Court denoted the second basis for its decision.

"A trial takes place only before the Court. No right of defendant was violated. There is no constitutional right to a preliminary hearing before a magistrate and the return of an indictment eliminates the need for a preliminary examination". (476 F.2d at 32).

To the contrary, once a defendant has raised the issue of the voluntariness of a confession or the lawfulness of a seizure, he is constitutionally entitled to a suppression hearing. While a preliminary hearing is held before a magistrate, a suppression hearing, because of the exceedingly sensitive nature of the questions involved, is presided over by a District Court Judge. The findings at a preliminary hearing are not final: they will be relitigated at trial. A trial judge's determination in a suppression hearing as to the admissibility of contested evidence is, on the other hand, conclusive. If defendants are denied a full hearing at

the suppression hearing, they will never receive a full hearing on the issues raised at that hearing.

Further, a preliminary hearing may be regarded, and often is employed, as a discovery device. A suppression hearing, however, neither serves, nor was it intended to serve, such a purpose. Any discovery of the prosecution's case would be merely incidental to the primary purpose of the suppression hearing: to assure that the defendant's constitutional rights against self-incrimination and against unlawful searches and seizures have not been violated by the Government's evidence-gathering process.

In addition, it seems clear that in this instance, none of the Government's case would be turned over to the defense under Judge Curtin's narrowly tailored order, which requires production only of prior statements of the Government witnesses relating to the subject matter of their testimony at the suppression hearing. Deputy Sheriff Behm testified only to the arrest of defendant Gibbons and the seizure of the four items of evidence (Court Exhibits 1-4) on December 8, 1972, (Tr. pp. 5-20). Special Agent Zona testified only to the arrest of defendant Sebastian on May 24, 1973 and the subsequent interrogation which led to the taking of the statement in question (Court Exhibit 6) (Tr. pp. 41-44). Since the indictment concerns only certain events occurring in May, 1972, it is obvious that no part of the Government's case against the defendants would be turned over under Judge Curtin's order. The spectre, raised by the Government, of the defense rummaging through the "investigative files" of the Federal Government or of the State of Ohio, is therefore a wholly unwarranted exaggeration.

Contrary to the Government's assertion, this Court has never held that the Jencks Act forbids a District Court from ordering production of a Government witness' prior statements at a suppression hearing in a proper case. In *United States v. Foley*, 283 F.2d 582 (2d Cir. 1960), the Government sought by

mandamus to have an order vacated providing for a suppression hearing and the production of certain documents at the hearing. Counsel's stated purpose there was for the cross-examination of Government witnesses. In denying the writ of mandamus, this court held that:

"The judge ordered these produced for his inspection, rather obviously to enable him to determine whether they contained material to which taxpayers were entitled. *We see nothing wrong with this*". (283 F.2d at 584). (Emphasis added)

Although the Government argues that the bulk of the documents in issue in *Foley* did not fall within the purview of the Jencks Act, this court tacitly acknowledged that the remainder of the documents were susceptible of production in the sound discretion of the trial judge.

In *United States v. Covello*, 410 F.2d 536 (2d Cir. 1969), this court interpreted its earlier holding in *Foley*.

"We denied the petition but read our denial as holding no more than that *we left it to the discretion of the trial judge* whether to order a production of documents; we do not read it to hold as a matter of law that the Jencks Act compelled disclosure to defense counsel of the pre-hearing statements of a witness who testifies at a suppression hearing". (410 F.2d at 544-5) (Emphasis added).

While *Covello* held that the Jencks Act did not compel the disclosure of statements as a matter of right, it left to the sound discretion of the trial judge the determination of whether the defense should be allowed access to those statements for purposes of cross-examination. In *Covello*, this court did no more than decline to overrule the trial judge who had, in the exercise of that discretion, denied the defense access to Jencks material.

United States v. Percevault, 490 F.2d 126 (2d Cir. 1974), this Court's most recent decision concerning the applicability of

the Jencks Act, does not militate against the production of statements at suppression hearings. There, by pre-trial motions for discovery under Rule 16(a), F.R. Crim.P., the defense sought disclosure of statements of prospective witnesses by an innovative application of the vicarious admissions rule. In reversing the order of the district judge, this Court noted that the Jencks Act "represents a legislative determination that access to a witness' statements could be useful in impeaching a witness but was not intended to be utilized in preparation for trial". 490 F.2d at 129.

The plain fact remains, however, that once the Government has chosen a course of conduct whereby it seeks to have a prior statement of the defendant admitted into evidence at trial, it must, of necessity, place the veracity of its witnesses in issue at a suppression hearing. In order for the defendant to have the full benefit of a suppression hearing, he must have the benefit of 3500 material. A suppression hearing is not mere "preparation for trial", but a proceeding at which issues are tried and finally determined, and therefore must be within the meaning of a statutory term "trial".

Even if the same witnesses who testify at a suppression hearing also testify at trial, as is hardly certain in this case,⁴ the issues to be litigated at trial will certainly not include the issues of the lawfulness of the search and seizure of evidence, or the voluntariness of the giving of the statements, sought to be introduced at trial. Defense counsel will certainly not be in a position at a jury trial to relitigate these issues, previously

⁴Judge Curtin noted: "In this case an essential part of the Government's proof in this case at a trial would be the very documents that we are concerned with at this hearing. It seems to me that to require defense to wait until trial and then have a looksee, and perhaps then maybe Mr. Behm would not even be a witness here so that they would never have an opportunity to look at his report". Tr. pp. 34.

decided at the suppression hearing.⁵ Unless the material is turned over for cross-examination at the suppression hearing, the opportunity for fully and fairly trying these issues will have passed forever, whether or not the same witnesses appear at both the suppression hearing and trial.

Of the cases cited by the Government, only *United States v. Montos*, 421 F.2d 215 (5th Cir. 1970) is contrary to the position taken by Judge Curtin in this case, in that only *Montos* holds squarely that the Jencks Act denies a District Judge discretion to turn over relevant materials at a suppression hearing. But the Fifth Circuit based its affirmance of Monto's conviction simply on "the express terms of the Jencks Act", that a suppression hearing was not a "trial". 421 F.2d at 220-221. The Court did not consider the legislative history discussed above, and betrayed no awareness of the ambiguity of the word "trial" which this court observed in *United States v. Covello*, *supra*, arising from Congress' apparent failure to consider the question whether a suppression hearing, at which crucial issues are tried, was included within the word "trial". The opinion therefore does not seriously deal with the issues raised here, and should not be followed.

The Government implies, in its brief and by its inclusion in the Appendix for the Appellant of a prior proceeding before Judge Curtin, that the District Judge abuse his discretion by announcing what the Assistant United States Attorney characterized as a "prospective decision that in all future cases Jencks material would have to be turned over" (Tr. p. 31). The statements of the District Judge, examined in context, will not bear the weight assigned them by the Government. When the

⁵"It is always possible to renew at trial a motion to suppress, but it was not the purpose of Rule 41(e) . . . customarily to countenance hearings and dispositions of the same issue, once before trial and once during, absent some new and unusual turn in the evidence at trial. The whole point of the pre-trial hearing of motions to suppress is to expedite the trial, even to the point of eliminating the need to have one at all". *Rouse v. United States*, 359 F.2d 1014, 1017 n.1 (D.C.Cir. 1966).

above-quoted misstatement by Assistant United States Attorney Srebro was made to the Court, Judge Curtin replied:

"I think I ought to make clear that this is not an automatic situation that there may be cases where it appears to me that there is good argument, that perhaps there is a good argument that the Government may be able to make why material should not be turned over at this time, but these things perhaps should be taken up on a case by case basis. What I mean to indicate is as a general rule this is something which the Government should look forward to and be ready to guard against" (Tr. pp. 31-22).

Judge Curtin is evidently requiring, as a general rule only that the materials be available in the courtroom for the exercise of his discretion "on a case by case basis". It is notable that the Court said; "... at the time of the hearing I want any thirty-five hundred material" (Tr. p. 31). And it is also clear that Judge Curtin's rulings in this case were based on the specific circumstances of the testimony of each witness. See Tr. pp. 34, 47-48.

Cognizant of the need for the defense to exercise its right to a full and effective cross-examination, yet mindful of the fact that an overly broad order could foster the incursions into investigative files which the act was designed to prevent, the District Judge limited his order so as to satisfy the requirements of both the prosecution and the defense. No roving perusal of those files was intended, nor could one have been accomplished, under the strictly limited terms of the order. Appellees urge that this order was well within Judge Curtin's discretion, and should thus be affirmed.

POINT II

The material ordered produced by the District Court is within the purview of the Jencks Act, 18 U.S.C. §3500, and is thus subject to production under the provisions of that act.

The Government repeatedly argues that Federal and State investigative files are not producible under the Jencks Act. No such issue is presented by this case. Only a very limited portion of the Government's files, those prior reports or statements of the witness relating to the subject matter already testified to, was ordered turned over. The Government concedes, as it must, that "that portion of the investigative file which constitutes the agent's report . . . and which related to his trial testimony" (Government Brief, p. 17, citing *United States v. O'Connor*, 273 F.2d 358 (2d Cir. 1959)) is subject to production under the Jencks Act. As no more than this was ordered produced by Judge Curtin, there is simply no issue in this case as to the scope of "statement or report" in 18 U.S.C. §3500. The only issue is whether the District Court has discretion to order these materials produced for cross-examination during the trial of crucial issues of fact at a suppression hearing. As appellees have argued in Point I of this brief, the District Court must be held to have that discretion.

CONCLUSION

Because of the overwhelming importance of protecting Fourth and Fifth amendment values, which will not be adequately protected without the full cross-examination necessary to a fair suppression hearing, the order of the District Judge should be affirmed.

Respectfully submitted,

Attorneys for Appellees:

DOYLE & DENMAN,

GEORGE P. DOYLE, *Of Counsel*

10 Ellicott Square Building

Buffalo, New York 14203

MARTOCHE & COLLESANO,

STANLEY J. COLLESANO, *Of Counsel*

76 Niagara Street

Buffalo, New York 14202

Daily Record Corp.

ESTABLISHED 1908

Western New York's Business and Legal Newspaper

RUSSELL D. HAY
Publisher

P. O. Box 6, 14601 - 11 Centre Park, Rochester, N. Y. 14608

Telephone
232-6920 Area Code 716

AFFIDAVIT OF SERVICE

RE: The United States of America v. Anthony James Sebastian
a/k/a Tony Sebastian and Patrick Gibbons

STATE OF NEW YORK)
COUNTY OF MONROE) ss.:
CITY OF ROCHESTER)

Johnson D. Hay , being duly sworn, deposes and says:

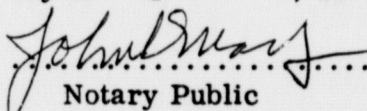
That he is associated with The Daily Record Corp. of Rochester,
New York, and is over twenty-one years of age.

That at the request of Stanley J. Collesano,
Attorney(s) for Appellees,
(s)he personally served three (3) copies of the printed [Record] [Brief]
[Appendix] of the above-entitled case addressed to:

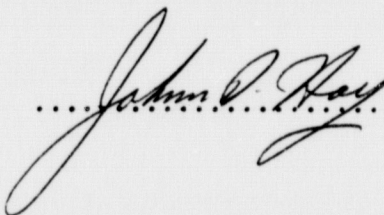
United States Attorneys Office
502 U. S. Court House
Buffalo, New York 14202

by depositing true copies of the same securely wrapped in a postpaid wrapper
in a Post Office maintained by the United States Government in the City of
Rochester, New York.

Sworn to before me this 12th
day of April , 19 74


Notary Public
Commissioner of Deeds

JOHN S. MAY
COMMISSIONER OF DEEDS
CITY OF ROCHESTER, N. Y.
My Commission Expires Jan. 9, 1975


.....